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RICHARD J. DALEY, Mayor and Local Liquor Control Commissioner, Plaintiff-Appellant, v. GERALD D. RYAN, Licensee, LICENSE APPEAL COMMISSION OF THE CITY OF CHICAGO, A. L. CRONIN, Chairman, Defendants-Appellees.	)	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. PRESIDING JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

This is an administrative review action. The Local Liquor Control Commissioner of Chicago appeals from a judgment of the Circuit Court, which affirmed the reversal by the License Appeal Commission of an order of the Commissioner revoking a retail liquor license. The defendant licensee has filed no brief.

The testimony of a police officer was the basis for the revocation of the City of Chicago retail license issued to Gerald D. Ryan for premises located at 865-67 North State Street, Chicago, Illinois, on the following grounds:

> "1. That on March 26, 1965, Gerald Ryan, licensee of the licensed premises, permitted a female on said premises, one Shirley Lee, to solicit a police officer on the licensed premises to purchase alcoholic liquor on said premises in violation of the statutes of the State of Illinois and ordinances of the City of Chicago.
>
> "2. That on March 26, 1965, Gerald Ryan, a licensee of the licensed premises, permitted a female on said premises, one Shirley Lee, to solicit a police officer on the licensed premises to engage in acts of prostitution in violation of the statutes of the State of Illinois and Ordinances of the City of Chicago."

The licensee, Ryan, testified that although he served the liquor to Shirley Lee, he denied hearing her ask the police officer for a drink and denied hearing anything said while Shirley Lee and the police officer were sitting at a table 12 feet from the bar.

The only issue on this appeal is whether the findings are supported by substantial evidence in the light of the whole record. Under the Administrative Review Act, the findings and conclusions of the Local Commissioner on questions of fact are to be held prima facie true and correct (Ill. Rev. Stat. 1965, Ch. 110, § 274). The reviewing court is limited to a consideration of the record to determine if the findings and orders of the Local Commissioner are against the manifest weight of the evidence. Daley v. License Appeal Comm., 53 Ill. App.2d 314, 319, 203 N.E.2d 44 (1964).

The credibility of the witnesses here was a question for the original agency, who heard and saw them testify. (Taylor v. Civil Service Comm., 33 Ill. App.2d 48, 52, 178 N.E.2d 200 (1961).) In order for the decision of the administrative agency to be contrary to the manifest weight of the evidence, where the evidence is conflicting, an opposite conclusion must be clearly evident. Ezydorski v. Krozka, 31 Ill. App.2d 79, 85, 175 N.E.2d 668 (1961).

As we cannot say on the record before us that the instant order of revocation was against the manifest weight of the evidence, we will not substitute our judgment for that of the Local Commissioner. (Daley v. License Appeal Comm., 53 Ill. App.2d 314, 319.) Therefore, for the reasons given, the order of revocation of the Local Liquor Commissioner is affirmed. The judgment of the Circuit Court and the order of the License Appeal Commission are reversed.

REVERSED.

BURMAN and ADESKO, JJ., concur.

Abstract only.

51274

PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error, v. RONALD L. WILLIAMS, Plaintiff in Error.	)	WRIT OF ERROR TO CIRCUIT COURT OF COOK COUNTY, ILLINOIS COUNTY DEPARTMENT, CRIMINAL DIVISION.

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

The defendant sued out a writ of error in the Supreme Court to review his conviction for the unlawful sale of narcotics. The Supreme Court transferred the case to this court, since there was no substantial constitutional question presented.

The defendant contends that the court committed error when it failed to exclude inadmissible rebuttal evidence prejudicial to the defendant; that reversible error was committed by refusing to give defendant's instruction; that the prosecutor's argument was inflammatory, misleading and prejudicial and the defendant was not proven guilty beyond a reasonable doubt.

On March 10, 1963, at about 10:30 P.M., James Banks, an informer, met Officers Crigler and Moseberry at 39th and Calumet in the City of Chicago. They went into a hallway at 3913 Calumet where Banks was searched and given five $1.00 bills, the serial numbers of which were recorded. During the search the officers went through Banks' clothing, his socks, shoes and hat. The testimony also shows that his trousers were dropped in order to complete the search. They found nothing on his person. During the search his shirt was taken off, and his shoes and socks were likewise taken off. After the search Banks proceeded to the Impulse Lounge

at 343 East 39th Street, where he met the defendant, Ronald Williams, and one Wilbert Gregory. Williams asked Banks if he was looking for some "stuff" (heroin). Williams told Banks that he had some. Banks gave Williams five $1.00 bills, which he counted, and Banks was told to walk to the front of the tavern. Williams then came back to Banks and gave him a tinfoil package containing heroin. These acts were observed by Officer Moseberry, who corroborated the testimony of Banks as to the sale. Banks then left the tavern, walked next door and gave the package to Officer Crigler, who field tested the contents. The test proved positive and Officer Crigler entered the Impulse Lounge and he and Officer Moseberry arrested the defendant along with Gregory and Mary Ann Hodges.

Officer Moseberry testified that Officer Crigler had searched Banks in a hallway at 3913 Calumet and they then gave Banks the recorded money. Officer Moseberry then went to the Impulse Lounge and Banks arrived three or four minutes later. Banks spoke to Ronald Williams and Wilbert Gregory. Banks then gave Williams five $1.00 bills; Williams in turn gave the money to Gregory. Gregory gave Williams two tinfoil packages. Williams gave one package to Banks, and then Banks left the tavern. The defendant Williams then went to the back of the lounge where Gregory was standing with Mary Ann Hodges. Gregory placed the $5.00 in the back of Hodges' skirt. While they were still standing together Officer Crigler entered the tavern and the three, namely, Williams, Gregory and Hodges, were arrested.

Officer Moseberry testified that from his experience in working on from 100 to 200 narcotics cases and observing people under the influence of narcotics he could determine if a person were under such influence. He testified that when he met Banks for the first time on March 10, 1963, Banks appeared to be normal and not under the influence of narcotics. However, Banks testified that he is a narcotics addict and uses two bags of narcotics a day; that on March 10, 1963, at about 8:00 P.M. "he shot a bag of narcotics."

At the police station after the arrest a policewoman searched Mary Ann Hodges and found ten $1.00 bills which she turned over to Officers Crigler and Moseberry. Office Crigler testified that five of the ten $1.00 bills given him by the policewoman were the ones he gave Banks.

Officer Crigler testified that prior to March 10, 1963, he had used Banks as an informer on three occasions; that he knew Banks was an addict but did not know that Banks was under the influence of narcotics on March 10, 1963.

The defendant testified that he was in the Impulse Lounge on March 10, 1963, at about 10:30 P.M. He was arrested by Officers Crigler and Moseberry, who found no money or narcotics on him. He claimed that he in no way participated in a sale of narcotics on March 10, 1963. He also testified that he is not a narcotics addict and that on March 10, 1963, he did not use a $3.00 bag of narcotics. When Williams was cross-examined by the State he was asked whether he had a conversation with Detective Moseberry on or about March 10, 1963, in which he asked Williams about

about his possible use of narcotics. There was an objection to this question. The defendant, however, answered, "Yes, and I told him, No." Officer Moseberry, in rebuttal over objection of defense, testified that he had a conversation with Williams at about 11:30 P.M. on March 10, 1963; that Officer Crigler and Gregory were present; that Williams told him that he first used narcotics in 1959; that he was a non-medical addict and that he used one $3.00 bag of narcotics per day.

The defendant first contends that it was reversible error for the court to allow the State to impeach the defendant by showing that he made a prior contradictory statement without an adequate foundation being laid on cross-examination. On cross-examination of the defendant the State asked the defendant, "Now, on or about March 10, 1963, did you have a conversation with Detective Mosenberry, in which he asked you about your possible use of narcotics?" An objection was made to the question on the basis that there was no proper foundation. The objection was overruled, and the defendant answered, "Yes, and I told him, No."

The State then called Officer Moseberry as a rebuttal witness. He testified that Williams told him he was a narcotics addict.

The following colloquy took place outside the presence of the jury in connection with the above objection:

> "Mr. Moran: I appreciate your putting this witness on to impeach Ronald Williams, on the basis of his testimony on cross examination. I think before they can impeach him on the basis of prior contradictory statements, they have to lay their foundation on their cross examination. If they call the witness - -

The Court: They are not impeaching on prior contradictory statements, as I understand it, they are impeaching him on his - - they are rebutting his evidence that he never used narcotics. Now, they are free to do that in any way that they can, to show that if he did, in fact, at some point use narcotics - -

Mr. Moran: Also, they asked him that, and he said, 'No.'

The Court: He denied that he use narcotics.

Mr. Moran: They are showing, by use of the State's witness, a prior contradictory statement that he did not use narcotics."

The defendant cites People v. Perri, 381 Ill. 244, 44 N.E.2d 857, and People v. Moses, 11 Ill. 2d 84, 142 N.E.2d 1, both of which cases hold in substance that before a witness may be impeached by his prior inconsistent statements he must be alerted concerning them in order to avoid unfair surprise and to give him an opportunity for explanation. There was no question here of the defendant being confused as to the place of the conversation, as the question put to the witness referred to the time and the parties involved in the conversation. The defendant, when the question was put to him relative to a conversation on or about March 10, 1963, with Detective Moseberry concerning defendant's possible use of narcotics, admitted that he recalled the conversation and his answer was, "Yes, and I told him, No." The affirmative part of the answer related to the conversation with Detective Moseberry on or about March 10, 1963, concerning defendant's possible use of narcotics. It cannot be said here that the defendant had not been alerted concerning the conversation or that he was not given an opportunity for explanation. He admitted the conversation and stated what his answer was.

Also it cannot be said that he was taken by surprise when Officer Moseberry testified to a contradictory version of that conversation when Moseberry was called by the State in rebuttal. We believe there was sufficient foundation laid to offer the impeaching testimony of Office Moseberry on rebuttal.

The defendant next contends that it was error for the trial court to refuse to give defendant's tendered instruction No. 6. The defendant has failed to abstract all tendered instructions and has abstracted only tendered instruction No. 6. This court is not bound to search the record itself to supply abstract deficiency, therefore error cannot be predicated upon the giving, refusal or modification of a single instruction. People v. Robinson, 27 Ill. 2d 289, 189 N.E.2d 243. This point therefore is not properly before this court.

The third contention of the defendant is that the closing argument of the prosecuting attorney was misleading, prejudicial and not based upon the evidence. During the closing argument the prosecutor said the following:

> "...that is what the defense wants you to believe, get the seller of narcotics, one of the most heinous crimes in the State of Illinois, ladies and gentlemen, a seller of narcotics, and it is easily said that almost 50 or 60 per cent of the other crimes in this community result from narcotics traffic."

An objection was made to this statement, which was sustained by the court and the jury was instructed to disregard the statement. The defendant cites People v. Lopez, 10 Ill. 2d 237, 139 N.E.2d 724. In that case the prosecutor in his closing argument referred to the defendant as "The Killer," by which name he was known, and then proceeded to castigate him as a "vicious, contemptible

man...a destroyer of lives." He also said to the jury, in referring to the defendant, that he didn't have to have horns on his head; he didn't have to be carrying a pitchfork and he didn't have to wear a dark and sinister look. "You see a man who destroys, who tears apart, who tears the living soul out of human beings." The prosecutor continued in that vein and said to the jury, "All of the men's clubs and women's clubs" were watching "to see what you are going to do about dope...to see what your response is, whether you are going to let a man like this go out and destroy more lives...." In the Lopez case the court said on page 240:

> "Careful scrutiny of the prosecutor's argument discloses that in a few isolated instances he may have transcended the bounds of legitimate argument. But we must be mindful of the considerable latitude permitted in legitimate argument. For example, there was evidence that the defendant sold a narcotic drug in violation of law, and it is common knowledge that the illegal drug traffic is a serious menace to society. It was proper to argue on the evil results of such a crime and urge fearless administration of the law. (cases cited) Moreover, reversal is not warranted unless it appears that the acts complained of influenced the jury in a manner that resulted in substantial prejudice to the accused. (See, generally, 15 I.L.P., Criminal Law, sec. 929.) Here the jury returned a just verdict; indeed, it was the only reasonable conclusion to reach upon the basis of the evidence adduced."

The objection here was immediately sustained and the jury was instructed to disregard the remarks of the prosecutor. Under such circumstances the argument did not constitute reversible error. People v. Henry, 68 Ill. App. 2d 48, 214 N.E.2d 550. In addition, in the present case the evidence of guilt was so overwhelming that the jury could not have reached any other verdict. People v. Travis, 64 Ill. App. 2d 197, 212 N.E.2d 272; People v. Burnett, 27 Ill. 2d 510, 190 N.E.2d 338; People v. Woodley, 57 Ill. App. 2d 380, 206 N.E.2d 743. We do not

believe that the foregoing statement of the prosecutor under the circumstances set forth constituted reversible error.

The defendant finally argues that the evidence was not sufficient to prove the defendant guilty beyond a reasonable doubt. In support of this contention the defendant argues that the search of Banks was not sufficiently thorough, and that it was possible that Banks had narcotics on his person during the search and prior to his entrance into the Impulse Lounge. We do not agree that the search was not thorough. The evidence showed that his sweater, shirt, shoes and socks were removed and searched, and that his trousers were searched while they were lowered to his knees. The defendant argues that the underwear was not searched, and also that the officers could not recall the type of underwear Banks was wearing. The failure of the officers to recall the type of underwear was certainly plausible. These police officers have no doubt searched numerous persons and to fail to remember the particular type of underwear worn by an informer during a search does not make their testimony unreliable. The mere statement in the brief of the defendant that Banks' underwear was not searched, weighed against the testimony of the officers who said they searched Banks and his clothing before turning over the marked money to him, is not persuasive. The argument that there was no proof that Banks did not have narcotics on his person prior to his entrance into the Impulse Lounge is without foundation. The testimony offered by the State, if believed, is sufficient to sustain the finding of guilty. In this case the actual transfer of the package and the money, which subsequently was recovered, was observed by the police officer and was testified to by

Banks. In People v. Romero, 54 Ill. App. 2d 184, 203 N.E.2d 635, the court said on page 189:

> "This court will not substitute its judgment on the matter of the credibility of witnesses and the weight to be given their testimony where the trier of fact saw and heard their testimony, unless we can say that the proof was so unsatisfactory as to justify a reasonable doubt as to the defendant's guilt."

In the case before us the jury concluded that the testimony of the State's witnesses was worthy of belief, and in our opinion it was amply sufficient to sustain the verdict of guilty.

Judgment affirmed.

Schwartz and Dempsey, JJ., concur.

Abstract only.

M 51268

COCA COLA BOTTLING COMPANY OF CHICAGO, INC., a Corporation, Plaintiff-Appellant, v. RICHARD A. LANGE, Defendant-Appellee.	Appeal from the Municipal Court of Chicago, First Municipal District of the Circuit Court of Cook County.

MR. JUSTICE DEMPSEY DELIVERED THE OPINION OF THE COURT.

The plaintiff appeals from a judgment entered in favor of the defendant at the termination of a nonjury trial in which it sought to recover damages in the sum of $328.00 sustained when its truck was involved in a collision with the automobile driven by the defendant. The sole contention on appeal is that the judgment of the trial court is against the manifest weight of the evidence.

In the late afternoon of March 7, 1962, the plaintiff's truck was travelling in an eastward direction on Huntley Road (a two-lane thoroughfare) in Algonquin, Illinois. The defendant was driving his auto in the opposite direction on the same road. It was snowing at that time and the surface of the road was completely covered. Traffic was heavy in the westbound and relatively light in the eastbound lane. The two vehicles collided.

The defendant testified that he was coming from a tavern where he had been interviewed for a job. He stated that he had not been drinking and no evidence was introduced to contradict this. He said that: he was travelling at a rate of speed of from 15 to 20 miles per hour; it was snowing and the visibility was very poor; there had been an accumulation of snow for the last week or so; he was driving as close to

the snowbank on his right as he could; he was unable to say whether or not he was over the center line because the road was completely covered with snow; the driver's door of his car was hit by the side of the truck; the door was completely demolished; the front of the car was not damaged; he did not remember anything after the impact, and someone took him to a hospital.

The driver of the plaintiff's truck testified that: he was driving about 20 miles per hour and was in his proper lane; when he noticed the defendant's car coming toward him he veered his truck to the right, but that the defendant's auto struck him at a time when the defendant's car was about 4 or 5 feet into the eastbound lane; the road was covered with snow so he could not see the center line; the truck was damaged on the left side; the defendant's auto was damaged on the left-front side, and that the truck came to a stop facing in a southeasterly direction.

A driver of a third car, apparently blinded by snow, testified that sometime after the first accident he ran head on into the defendant's auto which was stalled in the middle of the highway.

A police officer testified that he arrived at the scene 30 to 45 minutes after the vehicles had collided and learned that the defendant had been removed to a hospital; that his car was facing southwesterly in the eastbound lane; that there was debris from an accident in the eastbound lane, and that the defendant's car was damaged in the front end. On cross-examination he testified that it was snowing heavily, "practically a blizzard," there were

snowbanks on either side of the road, and that the truck, which was wide, was damaged on its left side.

Another police officer stated that he also arrived at the scene after the third driver had crashed into the defendant's car; that the defendant's auto was two feet into the eastbound lane where he observed debris on the road; that the left front portion of the defendant's auto was damaged, and that the truck, which was about eight feet wide with projections on its sides, was damaged on its left side.

We do not agree with the plaintiff's contention that the evidence in this case clearly shows that it is entitled to judgment. That the roadway was completely covered with snow, making it impossible to ascertain the whereabouts of the center line, is uncontradicted. There were only two eyewitnesses to the accident: the truck driver and the defendant. The former testified that he was travelling in his proper lane while the latter said he was driving as close to the right hand side of the road as was possible. This testimony would place each one in the correct lane. The position of the defendant's car in the middle of the highway after the accident can just as easily be attributed to the defendant's version of what took place as to the plaintiff's. The testimony of the two eyewitnesses was contradictory and it was for the trier of facts to determine whose testimony was worthy of belief. In nonjury trials the weighing of conflicting evidence is the especial function of the court. Inter-Insurance Exchange v. Travelers Indemnity Co., 57 Ill. App. 2d 17, 206 N.E.2d 518 (1965).

The testimony of the two police officers related to observations made by them after the second accident had occurred. This second accident could just as readily have accounted for the debris seen in the eastbound lane as the first collision. The second accident could have produced the frontal damage which the police observed and which was depicted in a photograph introduced into evidence by the plaintiff. The photograph, taken from an angle showing only the front end and not the left side of the defendant's auto which he said was struck, was taken after the second accident.

The trial court's determination of the facts will not be set aside unless it is manifestly against the weight of the evidence. Hood v. Brinson, 30 Ill. App. 2d 498, 175 N.E.2d 300 (1961). We have completely reviewed the record and find that the judgment is not contrary to the manifest weight of the evidence. The judgment of the trial court is affirmed.

Affirmed.

Sullivan, P.J., and Schwartz, J., concur.

Abstract only.

51745

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. RICHARD L. MARS (Impleaded), Defendant-Appellant.	)	APPEAL FROM CIRCUIT COURT COOK COUNTY CRIMINAL DIVISION

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

Defendant and Walter Wolfe were found guilty by a jury of the robbery of Willie Barnes. Defendant was sentenced to 1 to 20 years in the penitentiary. He appeals, maintaining that the trial court erred in giving two instructions to the jury. Wolfe, who was placed on probation, does not join in the appeal.

At approximately 9:00 P.M. on February 19, 1962, Willie Barnes was walking to his home on the south side of Chicago when he was accosted on the street by two young men, later identified as defendant and Walter Wolfe. The two men ordered Barnes into a nearby alley where they took $15 in currency from his pockets. Defendant ordered Barnes to give him his shoes, and after receiving the shoes, defendant struck Barnes in the face, causing Barnes to fall to his knees, and again struck him while he was on the ground. The two men fled and Barnes saw them enter the rear seat of a four-door blue and white Dodge automobile.

Barnes notified the police and gave a description of the assailants and the automobile in which they escaped. At approximately 9:30 P.M. the same night, two police officers cruising in a patrol car, sighted an automobile answering the description given by Barnes attempting to turn the wrong way into a one-way street five blocks from the scene of the robbery. The automobile was stopped and its occupants questioned. John Gray and Emanuel Trailer occupied the front seat, and Wolfe and defendant occupied the rear seat. One of the police officers searched the car and found a pair of shoes, later

identified by Barnes as those taken from him in the robbery, protruding from beneath the back of the driver's seat.

All four men were taken to the police station for questioning. Defendant and Wolfe were later identified by Barnes as the men who robbed him.

Defendant did not testify in his own behalf. A defense of alibi was offered through five witnesses.

Defendant's first contention is that the trial court erred in submitting an instruction to the jury relating to exclusive possession of proceeds of a robbery because the evidence in the case was insufficient to support the instruction, citing People v. Urban, 381 Ill. 64. The instruction reads:

> "The exclusive possession, shortly after the commission of a larceny, robbery or burglary, of stolen property, the proceeds of the crime, if unexplained, may of itself raise an inference of guilt of the person having such possession, sufficient to authorize a conviction in the absence of any other evidence of facts or circumstances in evidence which leave in the mind of the jury a reasonable doubt as to the guilt of such person."

The evidence supports the giving of the instruction which relates to the possession by defendant and Wolfe of the shoes taken from Barnes. The shoes were found by the police officer protruding from beneath the rear of the driver's seat in the immediate area occupied by defendant and Wolfe. The Urban case is not applicable on its facts. In Urban the evidence showed only that the defendant had keys to a garage where stolen property had been placed. There was insufficient evidence to show exclusive possession on his part in the light of evidence that other persons were seen entering and leaving the garage and that defendant gave an explanation of how he came into possession of the keys. In the case at bar no explanation was offered other than an outright denial of possession by Wolfe while on the witness stand.

Defendant also maintains that it was error for the trial court to give an instruction which allegedly placed upon him the burden to establish an alibi and of going forward with the evidence. The instruction reads:

> "The Court instructs the jury that, where a person on trial for a crime shows that he was in another place at the time when the act was committed, he is said to prove an alibi. One of the defenses interposed by the defendant in this case is what is known as an alibi, that is, that the defendant was at another place at the time when the witnesses for the State claim that certain acts and conversations took place. The Court instructs the jury such a defense is as proper and legitimate, if proved, as any other, and all the evidence bearing on that point should be carefully considered by the jury. If, in view of all the evidence, the jury have a reasonable doubt as to whether defendant was not present but was in some other place when the crime was committed, they should give such defendant the benefit of the doubt and find him not guilty. As regard the defense of alibi the jury are instructed that the defendant is not required to prove that defense beyond a reasonable doubt to entitle him to an acquittal. It is sufficient if the evidence upon that point raises a reasonable doubt of his presence at the time and place of the commission of the crime charged."

Defendant's contention is premised upon isolated words and phrases in the instruction. The instruction, however, must be considered as a whole and is substantially similar to those which the court found proper in People v. Smith, 25 Ill.2d 219. The case of People v. Pearson, 19 Ill.2d 609 is cited by defendant in support of his position that the instruction was improper. The Pearson case holds that while the instruction was improper the giving of the instruction did no substantial harm to the defendant in view of all the evidence in the case. While the instruction in the case at bar may be ineptly worded no substantial harm was done to the defendant in view of all the evidence in the case.

The judgment is affirmed.

JUDGMENT AFFIRMED.

LYONS, P.J., and BRYANT, J., concur.

51086
51087

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. ELIJAH H. JOHNSON and JAMES BALL, Defendants-Appellants.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY, CRIMINAL DIVISION.

MR. JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT:

This is an appeal from a judgment of the Circuit Court of Cook County wherein the defendants, Elijah H. Johnson and James Ball, were found guilty of robbery and aggravated battery. Defendant Johnson was sentenced to 1 to 10 years, and defendant Ball was sentenced to 1 to 3 years, both in the Illinois State Penitentiary. Defendants raise only one issue on this appeal, namely, that they were not found guilty beyond a reasonable doubt.

The evidence in this case is that sometime in the early morning hours of April 10, 1965, the complaining witness, Ellie Rice, was robbed and beaten by the defendants, James Ball and Elijah Johnson, who had gained access to the victim's room. Rice, the complaining witness, testified that the first time he knew of the presence of the defendants was when he woke up while Ball was trying to pull his watch off his arm. Johnson told Ball to see what else Rice had in his pockets; the defendants found a twenty dollar bill and a knife which was later found on Elijah Johnson. Complainant further testified that Johnson threatened to kill him, and that Ball stuck a knife into his side. Rice fought back and in the ensuing melee received a broken hand when he blocked a blow from Johnson, who was wielding a table leg. Rice finally was able to eject the defendants and to bolt the door shut. He also pushed his bed and a frigidaire against the door. Rice received burns on his right arm when the defendants poured hot grease through the transom.

Richard Shawala, one of the investigating officers, corroborated the victim's description of his wounds and stated that

there were grease marks on the transom, and that just past the center of the room there was a broken table.

Both defendants testified that they did not rob the victim. Defendant Ball stated that the victim had lost money to him playing cards, and that when he asked Rice for the money, Rice hit him and when the victim pulled a knife he (Ball) hit him with a table leg. Johnson testified that he was sitting in a chair in Ball's room waiting for him to return when he heard an argument, and that after Ball had hit the victim with a table leg, he grabbed Ball and took Ball back to his room which was down the hall from the victim's.

There are numerous inconsistencies and contradictions in the testimony of the defendants. Ball, for example, testified that he was playing cards on April 9th with the victim and LeRoy Clark until 7:00 or 8:00 p.m. when he left to go to a friend's home on the west side, whereas Johnson testified that he played cards with the victim, co-defendant Ball and Nathaniel. Johnson further testified that after showing a lady the way to Roosevelt Road he proceeded to Roosevelt Road and Wabash where he met LeRoy Clark at a parking lot at that location.

Ball testified that the victim pulled out a knife, whereas Johnson said the victim came out of his apartment with a knife (which as pointed out above was found on Johnson at the time of his arrest). Ball first stated that the victim hit him with his fist, whereas he had earlier testified that the victim hit him with a table leg.

The testimony of the victim, on the other hand, is both credible and corroborated by the testimony of the investigating officer both as to the nature and extent of the victim's injuries and as to the presence of the broken table and spilled grease in his room.

It has consistently been held that it is the function of the trial court to determine the credibility of the witnesses and the weight to be accorded their testimony. And, where, as here the testimony is merely conflicting, we will not substitute our judgment for that of the

trial court. People v. Scott, 34 Ill.2d 41, 213 N.E.2d 521; People v. Clark, 30 Ill.2d 216, 195 N.E.2d 631; People v. Boney, 28 Ill.2d 505, 192 N.E.2d 920.

For the above reason the judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

LYONS, P.J., and BURKE, J., concur.

51204

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. EDDIE JOHNSON, Defendant-Appellant.	)	APPEAL FROM CIRCUIT COURT COOK COUNTY CRIMINAL DIVISION

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

An indictment charged that Eddie Johnson and J.T. McKee committed the offense of murder in that they shot and killed Cody Williams on May 22, 1964. Each defendant pleaded not guilty and waived a trial by jury. The court found Eddie Johnson guilty of murder and sentenced him to serve a term in the penitentiary of not less than 14 nor more than 15 years. He appeals. J.T. McKee was acquitted.

At approximately 1:30 A.M. on May 22, 1964, Curtis Allen and Cody Williams were leaving the Lakeside Tavern at 46th Street and Lake Park Avenue in Chicago. As they did so, Williams bumped against a man who was entering the tavern. Williams and this man, later identified as James Johnson, began to argue. As Williams and James Johnson stepped outside to settle their differences, Curtis Allen spoke to James Johnson in an attempt to quiet him. James swung at Allen, who swung back and knocked him down. A crowd gathered. J.T. McKee, the co-defendant, came running out of the tavern with a gun. McKee fired several shots into the air and toward the ground as he shouted "break it up." At this time defendant Eddie Johnson came out of the tavern. He saw his brother, James, lying in the street and saw Curtis Allen standing near him with his fists up. Eddie Johnson then said to co-defendant McKee, "if you don't shoot, let me have the gun," and defendant, Eddie Johnson and co-defendant J.T. McKee began to "tussle" for the gun. The testimony is not clear whether the gun went off while defendant and McKee were struggling or the gun dropped to the street and then Eddie Johnson grabbed it and fired three or four times at

Cody Williams and Curtis Allen. Cody Williams was struck by a bullet. He managed to walk inside the tavern where he collapsed. He died on the way to the hospital. After the gun went off, hitting Williams, defendant got up along with McKee and said, "Come on, man, let's go before the cops come." Both men ran toward the house of defendant's sister where he returned McKee's gun to him and they parted company. The evidence showed that defendant Eddie Johnson, his two brothers, James and Andrew and J.T. McKee all left the house of defendant's sister and went to the tavern together. Eddie Johnson and J.T. McKee went into the tavern and James and Andrew Johnson remained outside. It was at the time James began to enter the tavern that this incident occurred.

Curtis Allen testified that an argument started between the deceased, Cody Williams, and James Johnson and he (Curtis Allen) interceded and fought with James; that Eddie Johnson ran out of the tavern saying to McKee, "if you don't shoot, let me have the gun"; that defendant tussled with McKee and snatched the gun and fired toward the deceased and himself; that defendant and McKee then ran down the street. This witness identified defendant Johnson and co-defendant McKee at an inquest as the men involved. Geneva Cox testified that she saw and heard the argument and ensuing fight between Curtis Allen and another man. She said that she heard defendant say he would shoot if McKee didn't and that defendant took the gun and shot the deceased. Co-defendant McKee testified that he was at the tavern with defendant Johnson, but denied knowledge of a shooting or that he had a gun. Defense counsel then took the witness stand in an attempt to impeach Miss Cox. Charles Johnson, testifying for his brother, stated that he was at the tavern with J.T. McKee, Eddie and his two brothers James and Andrew; that James got into an argument and fight with Cody Williams. Charles also testified that his brother Eddie came out of the tavern

and told J.T. McKee to "break it up." This witness further testified that his brother Eddie and McKee tussled for the gun and that Eddie grabbed the gun. Charles was asked during direct examination "Did Edward indicate to you that he knew that a man had been shot?" Charles replied, "Yes, he did."

Andrew Johnson, defendant's brother, testified that he was outside the tavern and saw James and an unknown man fighting. He did not see any of Edward's actions when he came outside. Defendant, Eddie Johnson, testified in his own behalf, stating that when he was leaving the tavern he saw a fight outside and saw his brother James lying in the street and Curtis Allen nearby with his fists raised. Defendant said he told J.T. McKee to "break it up" and they tussled and the gun fell into the street. Eddie said that he took a taxi to his sister's apartment at 4433 Lake Park Avenue, about three blocks from the tavern. Defendant stated during cross-examination that J.T. McKee was shooting, as did all the witnesses, except J.T. McKee who denied having a gun. Defendant testified that immediately after the shooting he did not pick up the gun but ran away with McKee. At this point in the cross-examination of defendant, the prosecutor asked if defendant recalled making a statement to the police with J.T. McKee present and defendant said he did. The statement was used to point out the inconsistencies of the testimony defendant had given. The statement said that Eddie said "break it up"; that defendant ran from the scene to his sister's house and that he gave J.T. McKee the gun, all of which were inconsistent with his preceding testimony.

The defendant insists that he should have been granted a separate trial. The People say that a separate trial was not necessary. The general rule is that where defendants are jointly indicted for the commission of a crime they are to be tried together and that whether a separate trial shall be granted is largely within the sound judicial discretion of the court. Paramount inquiry is whether the defenses

are of such antagonistic nature that a severance is imperative to insure a fair trial. People v. Lehne, 359 Ill. 631; People v. Barbaro et al., 395 Ill. 264; and People v. Brinn, 32 Ill.2d 232. In the instant case the defenses of Eddie Johnson and J.T. McKee were not antagonistic. The motion for a severance did not set out any ground. Defendant asserts that the presence of actual antagonism during the trial is sufficient to necessitate a separate trial, citing People v. Aldridge, 19 Ill.2d 176, where the court, speaking through Mr. Justice Schaefer stated, "No showing of anticipated antagonistic defenses was made before the trial, and the defenses, as actually presented, were not basically antagonistic." The court there was commenting on the condition of the record which showed that the case as presented did not show an antagonistic defense. We note that in the case at bar the trial judge first denied the motion to sever, then granted the motion and ordered the trial to proceed jointly. He said he would hear both cases at the same time and "try them as though there was a severance." The attorney for defendant Eddie Johnson agreed to this procedure. We conclude that the court did not err in denying a separate trial to Eddie Johnson.

Defendant maintains that it was reversible error to permit the People to use a confession obtained from defendant without supplying a copy of the confession to defense counsel before the trial. We find that the statement was an admission and not a confession. The statement, exculpatory in nature, was used by the People during cross-examination of defendant for the purpose of impeachment by showing that defendant had made prior inconsistent statements. The court did not err in permitting the People to cross-examine on the statement which the defendant gave to the police.

Finally the defendant urges that the "confession" taken from him while in police custody without warning him of his right to be silent or obtain counsel, was a violation of his constitutional rights

under the Fifth and Sixth Amendments of the Federal Constitution. The argument against the use of the statement by trial counsel was upon the issue of whether it was a confession and whether it was given to defense counsel prior to the trial. There was no testimony relating to a warning or lack of warning of defendant, nor any objection based on the violation of his constitutional rights. Johnson v. New Jersey, 384 U.S. 719, held that the Miranda decision applies only to cases in which the trial began after June 13, 1966. The trial of the case at bar took place in July of 1965. We are of the opinion that no constitutional question is raised by the unsupported allegation of denial of due process of law.

For these reasons the judgment is affirmed.

JUDGMENT AFFIRMED.

LYONS, P.J., and BRYANT, J., concur.

51327

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. ODELL TAYLOR, Defendant-Appellant.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY, CRIMINAL DIVISION.

MR. JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT:

This is an appeal from a judgment of the Circuit Court of Cook County finding the defendant, Odell Taylor, guilty of the crime of murder and sentencing him to twenty-five to fifty years in the state penitentiary.

The evidence in this case shows that the defendant, Odell Taylor, was married to Willa Thomas, step-daughter of the deceased. For a period of several months prior to the incident which led to defendant's arrest and conviction he had been separated from his wife. On the afternoon of February 3, 1962, the defendant met his wife and that evening tried to see her again. After determining that she was staying with her parents, Taylor later went to the home of the deceased. Upon arriving at the Thomas home at 12:30 a.m. the defendant never bothered to ring the doorbell, but instead threw a radio through the front picture window and thereby gained entrance.

Entering the house with a gun in hand, the defendant was first met by other daughters of the deceased. When the deceased began to start downstairs to see what had happened, one of his daughters told him to stay away because the defendant had a gun. After expressing a desire to kill his wife the defendant unsuccessfully searched the house for his wife who was hiding in a closet. Defendant forced the rest of the household into a bedroom where he held them at gun point and made several threats. For example, the defendant said at one point, "Don't play the hero. Don't anybody play the hero; then you won't get hurt...I have six bullets in this gun, and they are for all of you."

After the defendant had been in the house for some twenty minutes, the police arrived and began to move in on the house. According to Regina Thomas, one of the deceased's daughters, when defendant saw the police he turned toward his mother-in-law, pointed the gun at her and pulled the trigger. Apparently the gun misfired. The deceased then moved toward the defendant in an effort to prevent another attempt on his (the deceased's) wife. The defendant turned and fired and the two men grappled and in the course of falling another shot was fired hitting the deceased in the chest and ultimately resulting in his death.

Defendant raises three points on this appeal: (1) the defendant was not proven guilty of the crime beyond a reasonable doubt because there was an insufficient showing that the killing was committed with the requisite intent; (2) the evidence does not show beyond a reasonable doubt that the killing occurred in the course of a felony which in its consequence tends to destroy the life of a human being; and (3) the trial court erred in admitting hearsay evidence which was prejudicial to the defendant.

Defendant's first point is that the requisite intent was not established by the People, as required by Ch. 38 §9(a) Ill. Rev. Stat. 1965, which is as follows:

> "(a) A person who kills an individual without lawful justification commits murder if, in performing the acts which cause the death:
> (1) He either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another; or
> (2) He knows that such acts create a strong probability of death or great bodily harm to that individual or another; or
> (3) He is attempting or committing a forcible felony other than voluntary manslaughter."

In People v. Coolidge, 26 Ill.2d 533 at 536, 187 N.E.2d 694, it is noted that,

> "...since intent is a state of mind, and, if not admitted, can be shown only by surrounding circumstances, it has come to be recognized that an intent to take life may be inferred from the character of the assault, the use of a deadly weapon and other circumstances."

It is pointed out in People v. Scott, 284 Ill. 465, at 474, 120 N.E. 553, that:

> "The general rule is that threats to commit the crime for which the accused is on trial are competent as evidence against him upon the question whether he in fact committed it, as showing intention. An expression, to be admissible as a threat, must be of such character or made under such circumstances as to indicate a hostile purpose on the part of the speaker. The language used, or the circumstances under which used, must be broad enough to include the injured person within its terms, but threats, even against third persons, may be admissible where the connection between them and the deceased is such that under certain circumstances the threats would import harm to or hostility toward the deceased."

While the defendant in this case made no specific threats toward the deceased, there is evidence that the defendant intended to kill both his wife and himself. Defendant also made general threats to all present, saying "I have six bullets in this gun and they are for all of you," and more specific ones toward his mother-in-law. At all times during the period when he was in the house, the defendant had a revolver in his hand. The deceased met his death when he grappled with the defendant who had just pointed the gun and pulled the trigger on the deceased's wife. In the ensuing struggle the defendant fired two shots, the second of which caught the deceased in the chest. Taking the defendant's conduct as a whole, we find that anyone in the house on the night in question was in danger of being killed by the defendant, and that under the circumstances, the defendant had formed the specific intent to kill the deceased.

Since we have found that the requisite intent was established, we find it unnecessary to pass upon defendant's second point, and so we will now consider the defendant's last point on this appeal, that prejudicial hearsay was erroneously admitted into the record. The testimony that the defendant objects to is that of the deceased's wife

to the effect that one of the daughters was warning her father (the deceased) not to come downstairs because of the presence of the armed defendant. The allegedly prejudicial testimony of the deceased's wife is that her daughter said "Daddy, don't come down. Don't face Odell." Defendant claims that this testimony was highly prejudicial since it tended to show that, from the moment he entered the house the defendant was threatening the deceased.

Assuming arguendo that the admission of the above statement was erroneous, it does not follow that this is a sufficient cause for reversal. Error in the admission of evidence is harmless where the facts involved are established by other competent evidence as they are here. People v. Grundeis, 413 Ill. 145, 108 N.E.2d 483; People v. Crowe, 390 Ill. 294, 61 N.E.2d 348. It has also been held that where the record contains sufficient competent evidence to establish the guilt of a defendant beyond a reasonable doubt, the judgment will not be reversed for error in admitting evidence unless it can be seen that the error was prejudicial. People v. Baker, 365 Ill. 328, 6 N.E.2d 665; People v. Perrello, 350 Ill. 231, 182 N.E. 748.

Here, there is sufficient evidence to establish defendant's guilt beyond a reasonable doubt without considering the improper testimony of the deceased's wife, and, under the circumstances of the case, we are of the opinion that such testimony was not prejudicial to the defendant.

For the above reasons the judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

LYONS, P.J., and BURKE, J., concur.

51230

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. ELZA BRYANT, Defendant-Appellant.	)	Appeal from the Circuit Court of Cook County, Criminal Division.

MR. JUSTICE DEMPSEY DELIVERED THE OPINION OF THE COURT.

Burglars broke into the Felt Products Manufacturing Company, located on McCormick Boulevard in Skokie, Illinois, around 4:30 A.M. on January 18, 1965. Vending machines were pried open and cigarettes, candy, gum and coins were taken.

Elza Bryant, the defendant, was arrested for the crime nine blocks from the Felt Products' building and thirteen minutes after the Skokie police received word that a burglar alarm had been tripped. When arrested he was carrying a large, uncovered cardboard box which contained crowbars, an axe, cartons of cigarettes, candy bars and gum. $62.32 in change was found on his person.

Bryant, who lived on the south side of Chicago and who was a former employee of the Felt Products Company, was indicted, tried by the court, found guilty and sentenced to the penitentiary for a term of one to three years. He contends in this appeal that the trial court committed reversible error in denying his motion to suppress the evidence found in his possession at the time of his arrest.

When an arrest is made by an officer who has reasonable grounds for believing the person arrested is implicated in a criminal offense the officer has the right without a search warrant to contemporaneously search the person arrested in order to discover and seize the articles taken in the crime

or the instruments by which it was committed. Ill. Rev. Stat., (1963), ch. 38, para. 108-1(c)(d); People v. Boozer, 12 Ill. 2d 184, 145 N.E.2d 619 (1957). Reasonable grounds for arrest exist if the facts and circumstances known to the officer would warrant a prudent and cautious man in believing that the person arrested was guilty of the offense. Henry v. United States, 361 U.S. 98, 4 L. Ed. 2d 134; People v. Jones, 31 Ill. 2d 42, 198 N.E.2d 821 (1964).

Under the facts of this case the officers who arrested the defendant had reasonable grounds for believing he committed the burglary; in arresting and searching him they were acting as other men of prudence and caution, having the same knowledge, would have acted under the same circumstances. The officers were at the burglarized premises six minutes after receiving notice of the alarm. An inch or two of snow had fallen and two sets of footprints led away from the door through which the burglars had entered and left the premises. The officers followed these footprints. One set entered McCormick Boulevard and was lost. The other set went along the parkway and turned east on the south sidewalk of another street. There was no one else on the street and there were no other footprints in the freshly fallen snow. The officers trailed the prints on foot and in squad cars until they saw the man who was making them. The footprints led to the defendant.

The defendant's arrest was valid, his search reasonable and the seizure of the merchandise, change and instruments legal. The trial court was correct in overruling the motion to suppress. The judgment of the Criminal Division of the

Circuit Court is affirmed.

Affirmed.

Sullivan, P.J., and Schwartz, J., concur.

Abstract only.

50820

THE DIPLOMAT MOTEL INC.,
an Illinois Corporation,
Plaintiff-Appellant,
v.
THE PLATEAU, INC.,
an Illinois Corporation, et al.,
Defendants-Appellees.

APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY, CHANCERY DIVISION.

MR. PRESIDING JUSTICE LYONS DELIVERED THE OPINION OF THE COURT:

This is an appeal from an order approving the report of a Master and dismissing plaintiff's complaint. The complaint sought a decree that a lien be established against certain premises as a result of defendant's (lessor's) failure to return plaintiff's (lessee's) security deposit, upon surrender of the premises by plaintiff. The plaintiff filed a chancery action against defendant Plateau, Inc. (hereinafter referred to as defendant), Success Savings and Loan Association, Albert Ritter and Louis Ritter. As a result of an understanding between the parties, the Master was requested to leave open and reserve the issues against Success Savings and Loan Association, Albert Ritter and Louis Ritter. The Master approved the request and the case proceeded against defendant Plateau, Inc. only.

Plaintiff and defendant executed a lease dated December 24, 1957, whereby defendant leased to plaintiff a forty-five unit motel building located at the northeast corner of Lincoln and Farragut Avenues in Chicago, Illinois, for a term commencing June 1, 1958 and expiring on May 31, 1973. No security deposit was posted by plaintiff, but subsequently it loaned $45,000 to defendant, for construction purposes. The loan was repayable in fifteen monthly installments of Three Thousand Dollars each, the first installment due March 1, 1972. Subsequently plaintiff and defendant, pursuant to a lease amendment dated October 23, 1958, agreed that the $45,000 loan would be converted into a security deposit, to be held for the prompt and faithful

performance by plaintiff of all of the terms, conditions and covenants of said lease. The amendment further provided that if plaintiff failed to perform, defendant, at its option, might apply as much of the security deposit as was necessary to make good the default, but that plaintiff should have no right to make any such application. The amendment further provided that if defendant resorted to the security deposit, plaintiff would, on notice, restore the amount used to make good the default. Plaintiff was also given a lien on the demised premises in the amount of the security deposit. This is the lien which plaintiff seeks to foreclose,in this proceeding. Plaintiff failed to pay part of the rental for February, 1963, and all of the rent for March, 1963, amounting to $5,783.34. Defendant, on March 2, 1963, delivered to plaintiff a notice claiming the amount due and stating that unless payment of such rental was made in five days, the lease would be terminated. Subsequently, defendant filed a suit for rent and possession against plaintiff in the Municipal Court. On March 28, 1963, judgment was entered in favor of defendant for all rent due until and including March 31, 1963. Judgment for possession was likewise entered, but the writ of restitution was stayed for fifteen days. The judgment for rent, in the amount of $5,783.34, remains unsatisfied.

On April 3, 1963, a telegram was sent to plaintiff, which stated:

> The Diplomat Motel, Inc., Lincoln Avenue and Farragut Avenue, Chicago, Illinois. We withdraw and rescind any notices heretofore given you or which may have come to your attention with respect to any termination of your tenancy of premises commonly known as Northwest corner of Lincoln Avenue and Farragut Avenue, Chicago, Illinois, under lease dated December 24, 1957, under which we are lessor and you are lessee. Demand is made upon you to pay past due rental amounting to $9,525.01. The Plateau, Inc.

Plaintiff alleges, in its complaint, facts concerning the lease and the amendment to said lease. The complaint cites paragraph 13 of the lease, which states that the lessee's right to possession shall terminate in case of non-payment of rent and that lessor has the right to terminate the lease itself at its election. The complaint

also cites paragraph 17 of the lease, which states:

> The obligation of lessee to pay the rent reserved hereby during the balance of the term hereof, or during any extension hereof, or any hold-over tenancy created by acts of the parties shall not be deemed to be waived, released, or terminated, by the service of any five-day notice, . . . or any other act or acts resulting in the termination of lessee's right to possession of the demised premises. . . .

The complaint also alleges on information and belief, that defendant entered into a long term lease with Albert and Louis Ritter, or their corporate nominee; that said lease provided for the purchase of the premises and that the rights of the defendants, the Ritters, are subject and subordinate to the rights of plaintiff.

Defendant's answer states that judgment was entered in the Municipal Court for possession only and did not terminate the lease, denies that the keys were surrendered to defendant and accepted by defendant and denies that plaintiff is entitled to the benefit of the security deposit.

The matter was referred to a Master, for hearing. Defendant admitted, at said hearing before the Master, that the lease, the amendment to the lease and the notice were offered in evidence by the defendant in its case against plaintiff in the Municipal Court forcible detainer suit. Defendant also stipulated that the notice shown as Plaintiff's Exhibit 3, in the Municipal Court case, was duly served on plaintiff.

Harold Beider, Vice-President of plaintiff, testified that all of the furniture and furnishings were removed by April 6, 1963; that he went to the Summit Motel, where he saw David Schultz, the President of defendant; that he handed the keys of the premises to Schultz and told Schultz, "I am delivering the keys to you pursuant to your notice of termination"; and that Schultz took the keys from him and said "Okay." Mr. Davis, attorney for defendant, conceded that the keys were given to Mr. Schultz and stated that he was only concerned with the conversation that took place in the giving of the keys.

Beider, on cross-examination, was asked if a telegram stating that defendant was withdrawing and rescinding any notice heretofore given with respect to any termination of the tenancy under the lease was received at the Diplomat Motel on April 3, 1963. Plaintiff's attorney objected. The Master felt the objection was valid, but nevertheless let the question stand. The witness testified he received it. Plaintiff then offered in evidence the affidavit filed with the Recorder on April 11, 1963, which set forth the interest in the security deposit by plaintiff, which gave notice of its lien claim and the fact that the lease had been terminated. The affidavit was admitted in evidence.

Plaintiff also submitted the record of the Municipal Court case, which included the notice which states on its face that "Five days after service of this notice your lease of said premises will be terminated."

Schultz, President of defendant, testified that he was the party who served the Five-Day Notice on a Mr. Scott on March 2, 1963, at the Diplomat Motel premises. He acknowledged that he received the keys on approximately April 6, 1963 and that he saw trucks moving out various items and beds for approximately three days, before Beider appeared in his office on April 6, 1963.

Beider was recalled and testified that arrangements with reference to moving were made at the end of March.

Plaintiff then rested its case, subject to the issues left open as against the Ritters and as against the Success Savings and Loan Association, and requested that the Master reserve that as per a previous understanding. The Master approved said request.

He also filed his Report of Proceedings and recommended that:

(a) a decree be entered declaring that the provisions of the lease concerning rent had not been terminated,

(b) the time to repay the $45,000 security had not matured, said time being controlled by paragraph 29 (a) of the lease.

Objections were filed by plaintiff to the Master's report. In the main, the objections relate to the failure, by the Master, to make a finding that the lease was terminated, and that Exhibit 3 of the forcible detainer case was the said Notice of Termination. The report was approved by the trial judge. Plaintiff appeals from that order.

Plaintiff's theory of the case is (1) that the five day notice, the forcible detainer action, the judgment for possession, the action of plaintiff removing the furniture and the action of defendant in accepting the keys and sending the telegram, terminated the lease, (2) that upon termination of the lease, defendant was duty bound to return to plaintiff any security held by defendant not used to discharge the amount of the default, and (3) that the Master's fees could not be charged in whole or in part against plaintiff,where plaintiff is entitled to recovery of the security deposit.

Defendant's theory of the case is (1) that the five day notice, et al., did not constitute a termination of the lease, (2) that the security deposit is not repayable until March 1, 1972, when the lease expires, (3) that plaintiff being in default has unclean hands and therefore is not entitled to enforce the provisions of the lease granting a lien upon the premises, and (4) that Master's fees can be charged against lessee, where lessee is not entitled to recovery of the security deposit.

The issue to be determined by us is whether or not the actions of the parties amounted to termination of the lease entitling plaintiff to the security deposit. We agree with the trial judge that the lease was not terminated. The notice of termination served on March 2, 1963, admittedly contains clear and concise language that the lease will be terminated and does not contain anything about termination of possession. The Master in his report pointed out that as a written document, a lease usually has a dual character. It creates two distinct sets of

rights and obligations. One set arises from the relationship of landlord and tenant and is based on the law concerning privity of estate. The other set of rights and obligations grows out of the express stipulations of the lease and is based on the law concerning the privity of contracts. Medico-Dental Bldg. Co. v. Horton & Converse, 21 Cal.2d 411, 418, 132 P.2d 457, 462 (1942). Thus, the word "lease" in the five-day notice could reasonably have more than one meaning. It could have meant that lessor was terminating the privity of estate, or that lessor was terminating all the provisions of the written lease. We feel there is sufficient evidence in the record, to sustain the position taken by both the Master and the Chancellor, that the lessee surrendered possession of the premises, thereby terminating privity of estate, but not privity of contract, between the parties.

The Master heard the evidence and arrived at certain findings of fact and conclusions of law in his report. The report was approved by the trial judge and will not be disturbed by us on appeal.

The decree is affirmed.

DECREE AFFIRMED.

BURKE, J., and BRYANT, J., concur.

51022

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. RICHARD WILLIAMS, Defendant-Appellant.	)	APPEAL FROM CIRCUIT COURT COOK COUNTY CRIMINAL DIVISION

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

Defendant was found guilty at a bench trial of aggravated battery and was sentenced to 1 to 4 years in the State Penitentiary. On this appeal he maintains he was not proven guilty beyond a reasonable doubt.

Mrs. Alberta Walker testified that in May of 1965, she lived with the complaining witness, Niles Harrison, in a first-floor apartment in the 400 block of East 40th Street in Chicago. Defendant lived with Mrs. Hazel Scott in a basement apartment in the same building; the Walker apartment and defendant's apartment were connected by way of a rear stairway. At approximately 3:30 A.M. on May 24th, Mrs. Walker and Harrison were returning to the apartment when they were approached by defendant who asked them if they had seen his "old lady." By "old lady," Mrs. Walker testified, defendant was referring to Mrs. Scott. Mrs. Walker and Harrison stated that they had not seen Mrs. Scott and went into their apartment. A short while later defendant knocked on the rear door of the Walker apartment and again inquired about Mrs. Scott. He was told to go home because Mrs. Walker and Harrison had to be at work early in the morning. Defendant went to his apartment but returned upstairs and again went back to his apartment. Mrs. Walker testified Harrison followed defendant downstairs and there ensued a conversation between defendant and Harrison which Mrs. Walker was unable to hear. She stated Harrison remained downstairs for some 30 minutes after which he returned to the first-floor apartment, followed

immediately by defendant. Defendant was carrying one of Mrs. Scott's dresses and threatening to cut it up. Defendant was again told by Mrs. Walker to go back downstairs but he refused. Harrison then ordered defendant to leave but defendant challenged him. Harrison accepted the challenge and defendant attacked him with a pocket knife. Mrs. Walker testified that defendant then proceeded to beat and stab Harrison all over his body. Mrs. Walker left the apartment and called the landlord, who in turn called the police.

The testimony of Niles Harrison was substantially identical to that given by Mrs. Walker, except as to their whereabouts on the evening preceding the incident and except as to whether Harrison was in defendant's apartment immediately prior to the incident. Harrison also testified that defendant was intoxicated on the night in question.

The investigating police officer, James C. Gordon, testified he arrived at the Walker apartment in response to a headquarters' directive and found Niles Harrison unconscious on the kitchen floor. Harrison was taken to the hospital where it was determined that he had some 13 stab wounds in and around his stomach, face and head. Officer Gordon was directed to the home of defendant's mother where he arrested defendant. The officer testified that defendant had blood on his face at the time of the arrest but that he was in no way injured.

Defendant testified he acted in self defense and stated that on the night in question Niles Harrison knocked on his apartment door and questioned him about certain remarks that defendant was allegedly making about Harrison's relationship with Mrs. Walker. Defendant stated that Harrison struck him in the face and then put his hand into his pocket. Defendant caught hold of Harrison's hand before he could remove it from his pocket and pulled the hand out of the pocket with a knife. Defendant testified that he took the knife from Harrison and struck Harrison's head against the wall, rendering him unconscious for some 5 minutes. After Harrison regained consciousness he went upstairs

to his own apartment. Some 15 to 20 minutes later either Harrison or Mrs. Walker called to defendant to forget about the fight and come upstairs for a drink. As defendant entered the Walker apartment Harrison reached for a butcher knife from a kitchen cabinet. Defendant drew Harrison's knife which he had in his pocket after the earlier confrontation and the pair began to fight. Defendant stated he struck Harrison in the face and began striking him over his body. He testified he was not certain of the number of times he struck Harrison. The knife blade broke after a short while, and defendant left the apartment. Defendant testified that he acted purely out of self defense.

The question of whether defendant was convicted beyond a reasonable doubt revolves solely around the credibility of the witnesses in this case. As stated in People v. Clark, 30 Ill.2d 216, at page 219: "Where the cause is tried without a jury, it is the function of the trial court to determine the credibility of the witnesses and the weight to be afforded their testimony, and where the evidence is merely conflicting a reviewing court will not substitute its judgment for that of the trier of fact." The testimony offered by the State undeniably conflicts with that of the defendant, but this conflict does not of itself create a reasonable doubt as to defendant's guilt. People v. Kelly, 8 Ill.2d 604, 615. The trial court saw the witnesses, heard their testimony and determined their credibility and the weight to be given to their testimony.

Defendant points to several instances where Mrs. Walker's testimony varies from Harrison's testimony. These conflicts, if conflicts at all, are insubstantial. The first alleged conflict to which defendant points is that Harrison stated that he and Mrs. Walker visited some 4 taverns during the evening immediately prior to the incident, whereas Mrs. Walker testified that they had a few drinks at a tavern in the early evening after which they went to her daughter's house. Harrison, however, testified he was not certain whether they

had visited any place other than the 4 taverns he mentioned; Mrs. Walker testified that at the time defendant approached them they were returning to their apartment from a local tavern.

Defendant further contends the fact that Harrison went to defendant's apartment prior to the incident proves that Harrison was the aggressor. We disagree. Harrison testified that he did not remember going to defendant's apartment, although he acknowledged on the stand that Mrs. Walker said he did. Whether Harrison went to defendant's apartment or not has no bearing on what transpired in Mrs. Walker's apartment some half hour later. The trial court heard the evidence and determined that defendant was the aggressor and did not act in self defense. People v. Washington, 27 Ill.2d 104, 108.

The State's case is corroborated by facts in the record apart from the testimony of Mrs. Walker and Harrison. A defense of self defense was raised at trial, but the evidence shows that Harrison was stabbed some 13 times whereas defendant did not have a mark on his person. It is highly improbable that Harrison was the aggressor and that defendant acted in self defense. It is clear from the record that there was sufficient evidence to support the trial judge's determination of defendant's guilt.

For these reasons the judgment is affirmed.

JUDGMENT AFFIRMED.

LYONS, P.J., and BRYANT, J., concur.

No. 66-53M

In The

APPELLATE COURT OF ILLINOIS

Third District

A. D. 1967

Abstract

JOSEPH R. BURKE and ALICE BURKE,

Plaintiffs-Appellees,

vs.

KENNETH L. KASCHKE,

Defendant-Appellant.

Appeal from the Circuit Court of LaSalle County, Illinois, Magistrate's Division.

CORYN, J.

The undisputed evidence in this case established that plaintiffs, Joseph R Burke and Alice Burke, husband and wife, owned a two-story building in Ottawa, Illinois, which they rented to their son, Edward Burke, who resided in the second story of this building, and who operated a gasoline filling station in the first floor and yard area of this premises. There were light standards on the islands where the gas pumps were located, and Edward Burke had attached a sisal cord with colored plastic pennants to these light standards so that the pennants were displayed over the driveways between these islands. There was no evidence of the height from the driveway to the cord and pennants. The cords were tied to the light standards just below the lights. On September 14, 1963, the defendant, Kenneth L. Kaschke, drove his truck into the Burke gas station where it was filled with gas. An A-frame or boom, eleven feet nine inches high from the ground, had been installed on the flat bed of this truck so

that a winch could be used by defendant in his tree removing business. As defendant started to drive his truck out of the gas station, the boom on the truck caught the sisal cord, thereby pulling the light standards over and breaking the lights. Edward Burke replaced the lights, repaired the light standards, and for these services was paid $113.20 by his parents, the amount they seek to recover from the defendant in this case.

This cause was tried in the Magistrate's Division by a six-woman jury who found for defendant. In a post-trial motion, the plaintiffs renewed their motion for a directed verdict. The trial magistrate granted this motion, and entered judgment for the plaintiffs in the amount of $113.20, plus costs. Defendant appeals here from that judgment.

"A verdict may be directed for a plaintiff in a proper case. If plaintiff, at the close of all the evidence moves for a directed verdict, the trial court must consider all of the evidence in its aspect most favorable to the defendant, together with all reasonable inferences to be drawn therefrom, and if when so considered, there is any evidence standing alone and considered to be true, together with the inferences that may legitimately be drawn therefrom which fairly tends to support the defendant's defense, the court should not direct a verdict in favor of the plaintiff." Johnson v. Skau, 33 Ill. App. 2d 280.

We are of the opinion that there is sufficient evidence in this case to support the jury's conclusion that the defendant was not guilty of negligence, and, therefore, that the trial magistrate erred in granting plaintiff's motion for a directed verdict. Accordingly, the judgment previously entered in this cause is reversed, and judgment is hereby entered for the defendant.

Reversed.

Stouder, P. J. & Alloy, J. concur.

Case No. 66-68

In The

APPELLATE COURT OF ILLINOIS

Third District

A.D. 1967

JUDY K. SWIFT, administrator of the estate of Earl Swift, deceased,

Appellant-Plaintiff,

and

JUDY SWIFT GORDON,

Appellant-Intervening Plaintiff,

vs.

HEMP AND COMPANY, KING-SEELEY THERMOS COMPANY, successor in interest to the AMERICAN THERMOS PRODUCTS COMPANY,

Appellee-Defendant.

Appeal from the Circuit Court of the Ninth Judicial Circuit, Macomb County, Illinois.

Honorable Keith Scott, Judge Presiding.

Abstract

STOUDER, P.J.

Plaintiff Appellant, Judy Swift, commenced this action for the enforcement of a contract in the Circuit Court of Macomb County against Defendant Appellee, Hemp and Company and its successors in interest. Plaintiff appeals from an adverse judgment of the trial court after evidence was presented to such court sitting without a jury. The contract involved is a labor management contract entered into between Defendant and a local of the Steel Workers Union covering employees of Defendant. The principle provisions of the contract involved are those relating to life insurance benefits and the probationary status of employees.

Plaintiff's husband, Earl Swift, was employed by Defendant on March 21, 1961. He died in an automobile mishap unrelated to his employment on April 16, 1961 or twenty-five days after becoming employed by Defendant. Plaintiff made demand on

Defendant for payment of insurance benefits under the labor management contract which demand was refused by Defendant. The provision of the labor management contract relating to insurance benefits and upon which this action is based is as follows. "The company agrees to provide for its employees group insurance coverage subject to the regulations and provisions of the insurance carriers." The provision additionally described the limits, the nature of the insurance involved being life and accident insurance. The labor contract also provided that the union "Shall recognize a 30 day period from the date that a new employee is first employed during which the company has a right to demote, promote, transfer or discharge for any cause without interference by the union".

Both parties filed motions for summary judgment supported by affidavits which motions were denied by the trial court. No question of the propriety of such rulings is directly involved in this appeal. Thereafter in its answer Defendant alleged an affirmative defense the substance of which is that the provisions and regulations of the insurance carrier described in the contract, referred to the underwriting provisions of existing insurance policies. That these insurance policies were in effect prior to and on the day of the contract and on the date of Swift's decease which provided coverage after one month of continuous employment and hence Swift having died twenty-five days after becoming employed was ineligible for insurance benefits.

At the hearing Defendant introduced insurance policies providing coverage one month after continuous employment. The personnel secretary testified she told Swift that he was a probationary employee for thirty days and would not be eligible for insurance for one month. Also introduced into evidence was an application for insurance signed by Swift applying for insurance when eligible. It is conceded by both parties that in fact Swift was not covered by the insurance policies.

In seeking a reversal of the judgment of the trial court, Plaintiff contends that the judgment is contrary to the law and facts. Plaintiff's principle argument

is that the provision of the labor management contract relating to insurance benefits is clear and unambiguous and that the Defendant is obligated to provide insurance for all of its employees regardless of length of employment. According to Plaintiff the phrase which gives rise to this controversy, "subject to the regulations and provisions of the insurance carriers", means and refers to the regulations of the insurance code. To reach this conclusion Plaintiff asserts that the phrase "the insurance carriers" refers to insurance carriers generally. Accordingly the phrase means,subject to the provisions and regulations governing and controlling insurance carriers namely the insurance code. Defendant on the other hand contends that the "insurance carriers" referred to are the insurance carriers having policies in effect with the Defendant and that the "regulations and provisions" are the underwriting provisions of said policies. Without restating the general principles of contract construction the initial consideration is whether the phrase is ambiguous. See 17 Am. Jur. 2nd, Contracts, Sections 238 — 281, Lewis v. Real Estate Corp., 6 Ill. App. 2d 240, 127 N.E. 2d 272, Agnell v. Illinois Bell Telephone Co., 342 Ill. App. 516, 97 N.E. 2d 483 and Bertless Co., Inc. vs. Illinois Publishing & Printing Co., 320 Ill. App. 490, 52 N.E. 2d 47. Assertions by the parties that contrary meanings should be ascribed to a contract provision are not determinative of whether such provision is ambiguous. Initially such question must be resolved by the trial court in its endeavor to carry out the intent of the parties. Such intent is to be determined from the plain meaning of the language used, purpose sought to be accomplished by the contract as well as from a consideration of all the provisions of the contract.

We do not believe the trial court erred in concluding that the phrase involved is ambiguous. The phrase "insurance carriers" must have some meaning. Neither the identity of the insurance carriers nor the meaning of the phrase can be determined from the plain meaning of the language used, the purpose of the contract or the contract considered as a whole. Resort must be had to other evidence in order to explain such meaning. We agree that other provisions of the contract describing

and dealing with probationary employees do not limit the term "employees" as it appears in the insurance benefits provision. In the absence of the troublesome phrase involved, such provision would be deemed to apply to employees generally. However the fact that the word "employees" has a different meaning in other provisions of the contract is of no assistance in determining the meaning of "the insurance carriers" and does not support Plaintiff's assertion that no ambiguity exists.

Having concluded that extrinsic evidence is necessary to give meaning to the contract provision this brings us to Plaintiff's next assignment of error namely that the insurance policies were immaterial and therefore improperly considered by the trial court. In this respect Plaintiff argues that the insurance policies were improperly considered because the delay of coverage provision of one month as contained therein was different from the thirty day probationary period provided in the labor management contract. The insurance policies in question were in effect prior to and on the date of the execution of the labor management contract. The policies being in effect at the time of the contract are evidence of contemporaneous construction placed on the labor management contract by both parties to the contract. If policies had not been in effect on the date of the labor management contract or on the date of Swift's decease it would indeed be difficult to give any credence to the meaning of the contract provision as asserted by Defendant. The difference in an employee's probationary period as provided in the labor management contract and the delayed coverage period as provided in the insurance policies does not furnish any basis for concluding that the insurance policies are immaterial and should be disregarded. The insurance policies were presented in order to arrive at the meaning of an ambiguous contract phrase. The probationary period of an employee is involved only to the extent that it indicates the provisions of the insurance policies are harmonious with the provisions of the labor management contract and not incompatible therewith. We find nothing in the provisions of the contract which would require that the periods exactly coincide. In any event we are not required to determine distinctions based on periods of one month as opposed to periods of thirty days since it is uncontradicted that

Swift died twenty-five days after his employment.

The record discloses not only evidence of contemporaneous construction placed on the contract by the parties thereto but also evidence of unilateral construction by the Defendant acquiesced in by Swift at the time of his employment. Both the testimony of the personnel manager, to the effect that Swift was advised he would not become eligible for insurance until after one month of employment, and the legend on the application card which Swift signed, support the construction of the contract provision urged by Defendant. Under the circumstances we believe the trial court properly construed the labor management contract and the insurance policies together and its judgment that Defendant had performed its obligations under the contract is amply supported by the evidence.

Finding no error in the judgment of the Circuit Court of Macomb County said judgment is affirmed.

JUDGMENT AFFIRMED.

Alloy, J., and
Coryn, J. concur.